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March 12, 2002

BY FACSIMILE AND HAND DELIVERY

Honorable Karen Getman
and Commissioners
Fair Political Practices Commission
428 J Street, Sixth Floor
Sacramento CA 95814

Re: **Pre-Noticed Proposed Regulation 18531.7 - Member Communications**

Dear Chairman Getman and Commissioners:

This comment letter addresses one aspect of your Pre-Noticed Proposed Regulation 18531.7, concerning "member communications." Subdivision (c)(1) through (c)(3) propose to define when and how a "payment for communications," as that term is used in Government Code Section 85312, is a "contribution."

Background: a Brief History of "Member Communications"

"Member communications" exemptions have a long history at both the federal and state levels. Federal law at an early date banned corporate and labor union contribution activity in federal elections. However, shortly after the Congress enacted the Federal Election Campaign Act of 1971 ("FECA"), which incorporated the prior corporate and labor union prohibitions, the Supreme Court determined that such bans cannot prohibit or limit communications between a labor organization and its members. (*Pipefitters Union Local No. 562 v. United States*, 405 U.S. 385 (1972).) Thereafter, FECA, and the FEC's interpretive regulations, expressly permitted corporations, incorporated associations and labor organizations to communicate with their members, and to engage in express advocacy of the election or defeat of federal candidates to the limited class of members, shareholders, and others with associational interests, in two ways: defining who were members of the 'restricted classes' of such organizations and limiting the communications to those that were not general public advertising. (See, e.g., Title 11,

BY FACSIMILE AND HAND DELIVERY

CFR, § 114.) The purpose of permitting such communications with little hindrance was to preserve the associational rights of the members of such organizations.

In 1976, the FPPC -- in interpreting the reporting provisions of Proposition 9, the original Political Reform Act, -- exempted "newsletter communications" of organizations which were "regularly published" and sent to members, employees, shareholders, other affiliated individuals, and to those who request or purchase the publication," from any reporting requirements. (2 Cal. Code of Regs. § 18225(b)(4)(C).) The term organization was not defined or limited, although FPPC Regulations did require "political committees" generally to disclose "contributions" and "expenditures." (2 Cal.Code of Regs. § 18215 (a)(2)(C), (D) [e.g., as applied to political parties and committees formed or primarily existing for political purposes]; *see also* § 18225 (a)(2); *cf.* §18225(b)(4)(C).)

When contribution limitations and restrictions first appeared on the California "political reform scene" with Propositions 68 and 73, judicial decision again carved out protected space for associational communications. In its preliminary injunction order of May 19, 1989 in *Service Employees International Union* v. *Fair Political Practices Commission*, 721 F. Supp. 1172 (N.D.Cal.1989) and 747 F.Supp. 580 (N.D.Cal. 1990), *aff'd* 955 F.2d 1312 (9th Cir.1990), *cert. den.* 505 U.S. 1230 (1990), citing *Pipefitters, supra*, the federal district court found that communication between an organization and its members is a fundamental aspect of the constitutionally-protected right of association, and the court exempted such communications by labor organizations and other associations from the Proposition 73 contribution limits. The FPPC, interpreting the federal court's order, opined that political parties' communications with their affiliated registered voters are not considered "contributions" subject to applicable contribution limitation laws at the state or local levels. (See interpretation of political party member communication activities under *SEIU* in FPPC Advice Letters to *Lance H. Olson* (FPPC No. A-89-633) and *Charles H. Bell, Jr.* (FPPC No. A-89-634).

Proposition 208, former Section 85312, attempted to limit the political parties' right to communicate with members outside the contribution limits of that measure, while expressly permitting member communications by other groups and associations. This limitation also was challenged in *California Pro-Life Council et al. v. Scully, et al.*, 989 F. Supp. 1282 (E.D.Cal. 1998), *prelim. inj. aff'd*, 164 F.3d 1189 (9th Cir. 1999). The

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California Pro-Life Council case was dismissed in part as moot upon the voters' enactment of Proposition 34, which expressly repealed a portion of Government Code Section 85312 that restricted political parties' member communication rights.

Proposition 34's legislative findings state, *inter alia*, that "[p]olitical parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions." The measure's purposes include "(7) To strengthen the role of political parties in financing political campaigns by means of reasonable limits on contributions to political party committees and by limiting restrictions on contributions to, and expenditures on behalf of, party candidates, to a full, complete and timely disclosure to the public." The ballot pamphlet containing the text of Proposition 34 is posted on the Secretary of State's website at <vote2000.ss.ca.gov/VoterGuide/text/text_proposed_law_34.htm.>.

This background is important for the Commission's consideration of its responsibilities in rule-making under Government Code Sections 83111 and 83113 and in respect of the constitutional decisions of the courts and the policy judgments of the voters in enacting Proposition 34.

Here, we would like to address the particular issues related to these member communications *other than* the staff's efforts to define what is a covered or exempt communication, what is a covered or exempt organization, and who is a "member" of an organization. (Proposed Regulation 18531.7, subdivisions (a), (b) and (d) [Options 1-6, 9].)

In our view, adoption of any of the subdivision (c) options treating a payment for communications for non-general public advertising Government Code Section 85312 as a "contribution" to a candidate or ballot measure would be flatly inconsistent with the statute, which expressly states that such payments are not "contributions."

Government Code Section 85312, as amended by SB 34, provides as follows:

> "*For purposes of this title, payments for communications to members*, employees, shareholders, or families of members, employees, or shareholders of an organization *for the purpose of supporting or opposing*

BY FACSIMILE AND HAND DELIVERY

> *a candidate or a ballot measure are not contributions or expenditures*, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements. *However, payments made by a political party for communications to its members* who are registered with that party which would otherwise qualify as contributions or expenditures shall be *reported in accordance* with Article 2 (commencing with Section 84200) of Chapter 4, and Chapter 4.6 (commencing with Section 84600), of this title. (Italics added.)

Government Code Section 85303, also as amended by SB 34, provides as follows:

> (a) A person may not make to any committee, other than a political party committee, and a committee other than a political party committee may not accept, any contribution totaling more than five thousand dollars ($5,000) per calendar year for the purpose of making contributions to candidates for elective state office.
> (b) A person may not make to any political party committee, and a political party committee may not accept, any contribution totaling more than twenty-five thousand dollars ($25,000) per calendar year for the purpose of making contributions for the support or defeat of candidates for elective state office. *Notwithstanding Section 85312, this limit applies to contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office for communications to party members related to the candidate's candidacy for elective state office.*
> (c) Except as provided in Section 85310, nothing in this chapter shall limit a person's contributions to a committee or political party committee provided the contributions are used for purposes other than making contributions to candidates for elective state office. (Italics added.)

1. Subdivision (c)(1)

Subdivision (c)(1) offers the option of defining a payment made at the behest of a candidate to an organization that is used for "communications ... for the purpose of supporting a candidate or ballot measure" as a contribution to the candidate or

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committee. This means that if Candidate A raises funds for an organization's member communications activities, and those funds are used to support Candidate A, Candidate B or Ballot Measure C, the expenditures would be treated as "contributions" to Candidate A, Candidate B or Measure C, notwithstanding the specific language of the first sentence of Section 85312.

Except for a political party's expenditures for member communications as provided in the underlined portion of Section 85312 — enacted by the SB 34 amendments — there is no statutory basis for treating expenditures for the communications by any other organization as "contributions" to the candidates or measures that are the subject of the organization's member communications. We urge you to reject this option at the pre-notice stage.

2. Subdivision (c)(2)

Subdivision (c)(2) offers the option that a payment made by another person to an organization "earmarked" for "communications ... for the purpose of supporting a candidate or ballot measure" is a "contribution" to the organization.

Likewise, there is no statutory support for the concept that if a payer "earmarks" a payment to an organization to be used for member communications, the payment is a "contribution."[1] The statute plainly says otherwise. We urge you also to reject this option at the pre-notice stage.

3. Subdivision (c)(3)

Subdivision (c)(3) would treat as a "contribution" a payment by a third party to an

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[1] The staff report notes that committees may have difficulty in reporting such payments under electronic filing formats unless they are categorized as contributions. This "problem" is easily resolved under the current campaign reporting rules. A committee may categorize the payments as "contributions" for convenience or as "miscellaneous receipts." Such "miscellaneous receipts" of $100 or more are itemized in the same way contributions of $100 or more currently are itemized on campaign reports.

BY FACSIMILE AND HAND DELIVERY

organization, including a political party, made at the behest of a candidate or ballot measure and "earmarked" for "communications to members ... for the purpose of supporting or opposing the candidate or ballot measure." However, this would *not* be a contribution to the organization or political party receiving the payment but a contribution to the *candidate or ballot measure* by the person who made the payment to the organization or political party.

This rule would prohibit candidates or ballot measure committees from fund-raising or contributing to organizations if the candidate or measure and the organization share, and work together to accomplish, the common goal of urging the organization's members to support the candidate or measure. Again, there is no statutory basis for this rule.[2]

The staff report urges the adoption of this proposal as a prophylactic rule to "prevent evasion of the Proposition 34 contribution limits." However, since Proposition 34, Section 85312 itself is an express exception to those contribution limits, as is Section 85303(c); the rule and the exceptions are of equal force and therefore there is no statutory basis for prophylaxis.

Moreover, Proposition 34, as amended by SB 34, as applicable to political parties, *already* imposes a contribution limit on contributions made to political parties with respect to candidates: under Section 85303(c), a person may contribute up to $25,000 per calendar year to political parties for the purpose of making (a) contributions to candidates for elective state offices and (b) member communications at the behest of such candidates related to the candidate's candidacy for elective state office.

Thus, subdivision (c)(3) would confuse, not clarify, what seems clear enough already. By converting "earmarked" payments into contributions subject to Section

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[2] Since there are no limits on contributions to ballot measures (*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981)), the application of this proposal to an organization's member communications concerning ballot measures is less onerous but no less justifiable than its application to such communications concerning candidates.

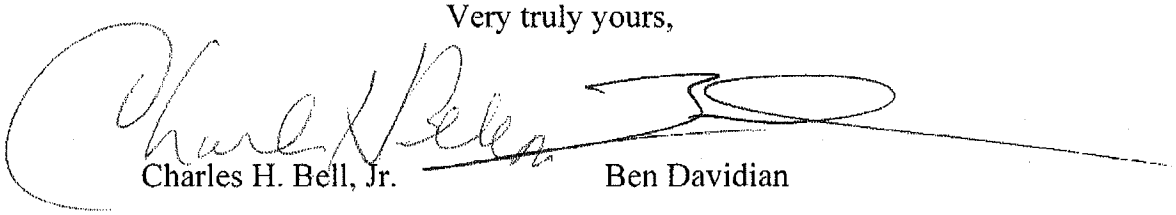
BY FACSIMILE AND HAND DELIVERY

85301, the rule would create *five different* contribution limits for political parties: (1-3) $3,000, $5,000 or $20,000 per election -- depending on the office of the candidate for elective state office involved -- for contributions received by the parties and "earmarked" for member communications (see also Section 85704); (4) $25,000 per year for contributions directly to candidates and (apparently) "non-earmarked" member communications; and (5) unlimited contributions for other purposes. Moreover, the rule would potentially subject such payments made to political parties to local jurisdictions' contribution limits without any justification.

Similarly, the rule as applied to PACs would create substantially the same confusion. It could convert the current $5,000 per year limit into separate $3,000 and $5,000 limits -- depending upon the office of the candidate for elective state office involved -- for contributions received by the PACs and "earmarked" for member communications (But see, Section 85303(a) and 85312.) It could potentially subject such payments made to PACs to local jurisdictions' contribution limits without any justification.

Thank you for the opportunity to comment on your regulations. We will be present at the Commission meeting to discuss this matter at its noticed hearing.

Very truly yours,



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cc: Honorable Jim Brulte
Honorable Dave Cox
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